Office - Supreme Court, U.S.
FILED
DEC 16 1982
ALEXANDER L. STEVAS,
CLERK

82-1016
NO.

# In the Supreme Court of the United States

OCTOBER TERM, 1982

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STEVEN HYMOWITZ*
STEFANIE J. ALLWEISS
McCALLA, THOMPSON, PYBURN & RIDLEY
1001 Howard Avenue
28th Floor
New Orleans, Louisiana 70113
504/524-2499

*Counsel of Record for Petitioner
South Central Bell Telephone Company

JOHN C. CAREY, JR.
General Attorney
South Central Bell Telephone Company
Post Office Box 771
Birmingham, Alabama 35201

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

## QUESTIONS PRESENTED FOR REVIEW

1. Whether the National Labor Relations Board or a Circuit Court of Appeals errs in disregarding a clear, unambiguous arbitral interpretation of a collective bargaining agreement and substituting its own contrary interpretation.

2. Whether union officials may be held to a higher accountability than rank-and-file employees to uphold a no-strike pledge of a collective bargaining agreement by not participating in wildcat strikes, and whether an employer commits an unfair labor practice by selectively disciplining union officials for participating in wildcat strikes.

3. Whether the United States Court of Appeals for the Fifth Circuit erred in affirming the National Labor Relations Board's decision on a ground not relied upon by the Board rather than remanding the case to the Board for further proceedings in light of the rule enunciated by the Fifth Circuit.

## STATEMENT OF INTERESTED PARTIES

SOUTH CENTRAL BELL TELEPHONE COMPANY is the Petitioner in this action. It is a wholly owned subsidiary of American Telephone and Telegraph Company (AT&T). Western Electric Company, Incorporated ("Western Electric") is a wholly owned subsidiary of AT&T. Western Electric and AT&T jointly own Bell Telephone Laboratories, Incorporated. AT&T owns all or a part of the stock of the following twenty-three operating telephone companies: Cincinnati Bell, Inc.; Illinois Bell Telephone Company; Indiana Bell Telephone Company, Incorporated; Michigan Bell Telephone Company; New England Telephone & Telegraph Company; New Jersey Bell Telephone Company; New York Telephone Company; Northwestern Bell Telephone Company; Pacific Northwest Bell Telephone Company; South Central Bell Telephone Company; Southern Bell Telephone and Telegraph Company; Southwestern Bell Telephone Company; The Bell Telephone Company of Pennsylvania; The Chesapeake and Potomac Telephone Company of Maryland; The Chesapeake and Potomac Telephone Company of Virginia; The Cheasapeake and Potomac Telephone Company (Washington, D.C.); The Cheasapeake and Potomac Telephone Company of West Virginia; The Diamond State Telephone Company; The Mountain States Telephone and Telegraph Company; The Ohio Bell Telephone Company; The Pacific Telephone and Telegraph Company (including Bell Telephone Co. of Nevada); The Southern New England Telephone Company; and Wisconsin Telephone Company.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW ..... i
STATEMENT OF INTERESTED PARTIES ..... ii
TABLE OF CONTENTS ..... iii
TABLE OF AUTHORITIES ..... iv
STATUTORY PROVISIONS ..... vii
OPINIONS BELOW ..... 1
STATEMENT OF JURISDICTION ..... 1
STATEMENT OF THE CASE ..... 2
REASONS FOR GRANTING THE WRIT ..... 6
I. The Decisions Of The United States Circuit Courts Are In Conflict With Respect To The Authority Of The NLRB Or A Court To Substitute Its Interpretation Of A Collective Bargaining Agreement For That Of An Arbitrator ..... 6
II. An Important Question Of Labor Law Exists As To Whether Fundamental Policy Considerations Require Union Stewards Be Held To A Higher Standard Of Accountability Than Rank-And-File Employees For Participating In An Unauthorized Strike ..... 12
III. The United States Court Of Appeals For The Fifth Circuit Erred In Affirming The National Labor Relations Board's Decision On A Ground Not Relied Upon By The Board Rather Than Remanding The Case To The Board For Further Proceedings In Light Of The Rule Enunciated By The Fifth Circuit ..... 17
CONCLUSION ..... 19
CERTIFICATE OF SERVICE ..... 20
APPENDIX A ..... A-1
APPENDIX B ..... A-28
APPENDIX C ..... A-43

## TABLE OF AUTHORITIES

**Cases:** **Page**

*Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979) ..... 11

*C. H. Heist Corp. v. NLRB*, 657 F.2d 178 (7th Cir. 1981) ..... 16

*Chrysler Corp.*, 232 N.L.R.B. No. 74 (1977) ..... 12, 13, 14, 15

*Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981) ..... 14

*Consolidation Coal Co.*, 263 N.L.R.B. No. 188 (1981) ..... 15

*Dairylea Cooperative, Inc.*, 219 N.L.R.B. 656 (1975), *enforced sub nom. NLRB v. Milk Drivers & Dairy Employees*, 531 F.2d 1162 (2nd Cir. 1976) ..... 12, 13

*First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981) ..... 6, 18

*Fournelle v. NLRB*, 670 F.2d 331 (D.C. Cir. 1982) ..... 4, 6, 8, 9, 10

*Gould, Inc. v. NLRB*, 612 F.2d 728 (3rd Cir. 1979), *cert. denied*, 449 U.S. 890 (1980) ..... 14, 15, 16

*Hammermill Paper Co. v. NLRB*, 658 F.2d 155 (3rd Cir. 1981) ..... 16

*Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) ..... 9

*Indiana & Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979) ..... 14, 15, 16

*Metropolitan Edison Co., v. NLRB*, 663 F.2d 478 (3rd Cir. 1981), *cert. granted*, 102 S.Ct. 2926 (1982) ..... 5, 6, 16, 19

*Midwest Precision Castings Co.*, 244 N.L.R.B. No. 63 (1979) ..... 13

*Motion Picture Laboratory Technicians, Local 780*, 227 N.L.R.B. No. 79 (1976) ..... 13

*NLRB v. Armour-Dial, Inc.*,
638 F.2d 51 (8th Cir. 1981).....14, 15, 16

*NLRB v. Brown*,
380 U.S. 278 (1965).....15

*NLRB v. Enterprise Association of Steam*,
429 U.S. 507 (1977).....6, 17

*NLRB v. J. Weingarten, Inc.*,
420 U.S. 251 (1975).....13

*NLRB v. South Central Bell Telephone Co.*,
254 N.L.R.B. 315 (1981),
688 F.2d 345 (5th Cir. 1982).....1, 6, 11, 17

*Precision Castings Co.*,
233 N.L.R.B. No. 35 (1977).....15

*Russell Parking Co.*,
133 N.L.R.B. 194 (1961).....15

*Skidmore v. Swift Co.*,
323 U.S. 134 (1944).....15

*Stockham Pipe Fittings Co.*,
84 N.L.R.B. 629 (1949).....12

*Super Value Xenia*,
228 N.L.R.B. No. 156 (1977).....14

*United Electrical, Radio & Machine Workers of America, Local 623*, 230 N.L.R.B. No. 59 (1977).....13

*United Steelworkers v. American Mfg. Co.*,
363 U.S. 564 (1960).....9

*United Steelworkers v. Enterprise Wheel & Car Corp.*,
363 U.S. 592 (1960).....9, 10

*United Steelworkers v. Warrior & Gulf Navigation, Co.*,
363 U.S. 574 (1960).....8, 9

*University Overland Express, Inc.*,
129 N.L.R.B. 82 (1960).....12, 15

**STATUTES**

**29 U.S.C. §158(a)(1)(3)** ..... **3, 4, 7, 13**
**29 U.S.C. §173(d)** ..... **8**

## STATUTORY PROVISIONS

**National Labor Relations Act:**

Section 8 (a)(1), 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(1) (1976):

> "(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7;
>
> ...."

Section 8(a)(3), 49 Stat. 452 (1935), 29 U.S.C. § 158(a)(3) (1976) [in pertinent part]:

> "(a) It shall be an unfair labor practice for an employer—
>
> ...
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:
>
> ...."

**Labor-Management Relations Act of 1947:**

Section 203(d), 61 Stat. 153 (1947), 29 U.S.C. §173(d)

(1976) [in pertinent part]:

> "(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

IN THE
SUPREME COURT OF THE UNITED STATES

---

OCTOBER TERM, 1982

---

SOUTH CENTRAL BELL TELEPHONE COMPANY,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

---

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 688 F.2d 345 (5th Cir. 1982). The Decision and Order of the National Labor Relations Board is reported at 254 N.L.R.B. 315 (1981).

## JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1982. Petitioner's Request for Rehearing was denied by order of the Court of Appeals on November 2, 1982.

## STATEMENT OF THE CASE

This case arose out of a wildcat strike which occurred during July and August of 1979 at Petitioner's Hammond, Louisiana facility. South Central Bell Telephone Company ("Petitioner" or "South Central Bell") is engaged in the business of providing telecommunication services to five southern states.[1] Petitioner and the Union[2] were parties to a collective bargaining agreement which was in force from August 7, 1977 through August 9, 1980 and which covered, among others, the employees working at Petitioner's Hammond, Louisiana facility. On July 31, 1979, 21 of the 23 unit employees scheduled to work at the Hammond facility called in sick. On August 1, 1979, 19 of the 23 again called in sick. Believing that the employees had engaged in a strike in violation of the collective bargaining agreement's no-strike provision, Petitioner gave two-day suspensions to all employees who were absent for one day and four-day suspensions to all employees who were absent both days. The five union stewards who participated in the work stoppage were suspended for an additional five days.

On a prior occasion, in 1972, Petitioner disciplined union stewards more severely than rank-and-file employees for participating in a one day strike at Petitioner's Columbia, Tennessee facility in violation of the collective bargain-

[1] Louisiana, Kentucky, Mississippi, Tennessee, and Alabama.

[2] Communications Workers of America, AFL-CIO.

ing agreement's no-strike provision.[3] This differential treatment became the subject of a grievance which was resolved through arbitration pursuant to the agreement then in effect between Petitioner and Union. In a decision dated February 28, 1974, to which the Petitioner and Union were parties, Arbitrator Patrick J. Fisher upheld the disparate discipline of stewards, finding that "because of their official positions they [the stewards] had a higher degree of responsibility and...a more severe penalty is appropriate."[4]

Subsequent to this 1974 decision the parties renegotiated their collective bargaining agreement without changing the language of the no-strike clause or the mutual responsibility clause.

As a result of the harsher penalty imposed on stewards in 1979, the Union filed unfair labor practice charges with the National Labor Relations Board, alleging violations of §§8(a)(3) and (1) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. §158(a)(3) and (1). The

---

[3] The same agreement covers employees at the Columbia and Hammond facilities.

[4] At the time of this decision the contract contained a general no-strike pledge and a "mutual responsibility clause", Art. 28.01 which provided, in pertinent part that in the "best interests of both parties, the employees and the public"...

> *the Union and their respective representatives at all levels will apply the terms of this Contract fairly in accord with its intent and meaning* and consistent with the Union's status as exclusive bargaining representative of all employees in the unit. (Emphasis added).

Board found any selective discipline imposed on stewards for participating in a wildcat strike violated §§8(a)(1) and (3) of the National Labor Relations Act—a *per se* rule of liability. The United States Court of Appeals for the Fifth Circuit enforced the Board's order, although on different grounds than those relied on by the Board, and notwithstanding the prior arbitration decision interpreting Petitioner's collective bargaining agreement to permit selective discipline of union officials who engage in wildcat work stoppages.

The decision of the Fifth Circuit is in conflict with the decision of the United States Court of Appeals for the District of Columbia in *Fournelle v. NLRB,* 670 F.2d 331 (D.C.Cir. 1982) where, on indistinguishable facts, the Court held that the Board was not free to ignore a prior arbitrator's decision in deciding the legality of the employer's actions.

In the instant case the Fifth Circuit rejected the *per se* rule announced by the Board and held that in order to impose extra discipline on stewards, there must be clear and unequivocal contractual authority for same. The Court found that an arbitrator's decision could not be relied upon to provide such authority. The Court further found that the language of the collective bargaining agreement did not impose a responsibility on stewards not to engage in wildcat strikes, thereby substituting its interpretation for that of Arbitrator Fisher.

The issues decided by the Fifth Circuit are presently pending before this Court. The issue of whether a prior arbitration award is sufficient authority upon which to base disparate discipline of union stewards who engage in wildcat strikes is before this Court on writ of certiorari in the case of *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478 (3d Cir. 1981) *cert. granted*, 102 S.Ct. 2926 (1982). Also at issue in *Metropolitan Edison* is whether stewards may be given harsher discipline, in the absence of any contractual authority when they engage in wildcat strikes. *Metropolitan Edison*, which was decided by the Third Circuit Court of Appeals, is virtually on all fours with the case at hand.

*Metropolitan Edison* is scheduled for oral argument on January 11, 1983 at 11:00 A.M. Petitioner recognizes there is not sufficient time to request this Court hear its case in conjunction with *Metropolitan Edison* pursuant to Supreme Court Rule 19.4, although the cases involve identical and closely related questions.[5] Nevertheless, Petitioner asks this Court to grant certiorari as the issues in this case present important federal questions concerning the continued viability of arbitration as a mechanism for resolving industrial disputes and the rights and responsibilities of union stewards. In the alternative, Petitioner asks this Court to hold in abeyance its decision to grant

[5] Petitioner had sought to stay the mandate of the Fifth Circuit pending the Court's decision in *Metropolitan Edison* which should be dispositive of the issues herein. The Fifth Circuit denied the stay, leaving Petitioner no alternative but to Petition for Certiorari so as to prevent issuance of mandate prior to this Court's decision in *Metropolitan Edison*.

certiorari in the instant case pending the outcome of *Metropolitan Edison* which should be dispositive of the case at hand. Denial of certiorari in this case prior to issuance of the decision in *Metropolitan Edison* would automatically trigger the mandate of the Fifth Circuit and leave Petitioner with no remedy in a case identical to one in which this Court granted certiorari.

Finally, Petitioner seeks review of the Fifth Circuit's affirmance of the Board's decision on a ground not relied upon by the Board, rather than remanding the case to the Board for further proceedings. This action by the Fifth Circuit is totally contrary to the decisions of this Court in *NLRB v. Enterprise Association of Steam*, 429 U.S. 507 (1977) and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

## REASONS FOR GRANTING THE WRIT

### I. The Decisions Of The United States Circuit Courts Are In Conflict With Respect To The Authority Of The NLRB Or A Court To Substitute Its Interpretation Of A Collective Bargaining Agreement For That Of An Arbitrator.

The cases of *Metropolitan Edison v. NLRB*, 663 F.2d 478 (3d Cir. 1981) *cert. granted*, 102 S.Ct. 2926 (1982); *Fournelle v. NLRB*, 670 F.2d 331 (D.C. Cir. 1982), and *NLRB v. South Central Bell*, 688 F.2d 345 (5th Cir. 1982) involved work stoppages in violation of contractual no-

strike clauses wherein the employer disciplined participating union officials more severely than rank-and-file employees. In all these cases the employer relied on prior arbitral interpretations of the contract recognizing a greater duty of union officials to comply with the no-strike clause. Notwithstanding these arbitral interpretations, the Board ruled in each case the employers violated §§8(a)(1) and (3) of the NLRA—a *per se* rule that disparate discipline can never be imposed.

On review, all three circuit courts have rejected the Board's *per se* rule and held that a collective bargaining agreement may impose on union officials a special duty to comply with a no-strike pledge and permit selective discipline of an official for a breach of that duty. The Third and Fifth Circuits differ from the D.C. Circuit as to whether the contract must contain explicit language imposing a special duty or whether an arbitral interpretation of the agreement can establish a higher degree of responsibility. The Fifth Circuit, in the instant case, found an unfair labor practice because, in its view, only an express and unmistakable contractual waiver of the officer's statutory protection would suffice.[6]

The D.C. Circuit, on the other hand, properly re-

[6] The Court found that a prior arbitrator's decision could not be such a waiver. It also held that the language in Art. 28.01 of the collective bargaining agreement (Fn. 4, *supra*.) did not constitute such a waiver even though that same clause was contained in the prior contract upon which Arbitrator Fisher based his decision that stewards could be selectively disciplined for participating in a wildcat strike.

jects the Fifth Circuit's position, finding

> [t]he parties to the collective bargaining agreement in the present case would no doubt be highly displeased if arbitral *stare decisis* were as inconstant a doctrine as Fournelle and the Board would have us believe. The whole function of arbitration as a 'vehicle by which meaning and content are given to the collective bargaining agreement' would be impaired if the parties could not rely on a settled construction of their agreement.

*Fournelle, supra* at 345.

The views of the Fifth Circuit are erroneous as they conflict with fundamental federal labor policy under which arbitrators are given the task of filling in the inevitable gaps in collective bargaining agreements. Collective bargaining lies at the very heart of our national labor policy as the self-rule for the government of an industry or plant. However, recognizing collective bargaining agreements cannot be worded so as to cover every conceivable dispute, where there is a dispute under the agreement, it is the congressional intent that arbitration be the method of resolution. 29 U.S.C. §173(d). Further, the Supreme Court has recognized the special expertise of arbitrators in interpreting collective bargaining agreements. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

Because of Congress' mandate and this Court's recognition of the special expertise of arbitrators in inter-

preting collective bargaining agreements, arbitrators' decisions are given special deference. *See United Steelworkers of America v. Warrior & Gulf Navigation Co., supra.* at 582 (1960). Courts do not review the merits of arbitration awards and they will enforce the awards even when the courts themselves would have reached a different result. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562-63 (1976); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). Accordingly, an arbitrator's decision must be viewed by the courts as an integral part of the agreement.

Based on the principles enunciated in the *Steelworkers Trilogy,* [7] the Court of Appeals for the District of Columbia Court found the arbitral interpretation of a collective bargaining agreement binding on the Board and courts. The District of Columbia stated:

> The question here is whether, on the one hand, the Board and Courts should read the agreement in accordance with the clear ruling of the arbitrator or, on the other hand, should substitute their interpretation for the aribtrator's. We conclude...that the Board erred in ignoring the arbitral interpretation of the contract.

*Fournelle, supra* at 344.

---

[7] *United Steelworkers v. Warrior & Gulf Navigation Co., supra.; United Steelworkers v. American Mfg. Co., supra;* and *United Steelworkers v. Enterprise Wheel & Car Corp., supra.*

Thus, the D.C. Circuit Court in *Fournelle* held that

> the collective bargaining agreement, including the authoritative interpretation of the arbitrator, imposes special duties on union officials during unauthorized strikes and permits the employer's selective punishment of union officials who flaunt those duties.

*Id.* at 345.

The *Fournelle* view of the role and long-term impact of arbitration is consistent with the stance of the *Steelworkers Trilogy* and Congress' expressed intention regarding the paramount role of arbitration as the method of resolution of disputes under collective bargaining agreements. The Fifth Circuit, however, in affirmance of the Board, failed to give effect to the arbitral interpretation and construed the contract to the contrary. In construing the contract to the contrary, the Court usurped the function specifically reserved to the arbitrator under *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).[8]

---

[8] Petitioner and the Union bargained for the arbitrator's interpretation of the contract, not the Board's or the Fifth Circuit's. They should receive the benefit of that bargain. *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. at 599.

Parties to collective bargaining agreements constantly rely on arbitral decisions to determine their future actions. Both the Board and the Fifth Circuit ignored this fundamental practicality of industrial relations in their decisions. Rejection of arbitral decisions greatly destabilizes the industrial environment and conflicts with an underlying policy of the Act which is to stabilize industrial relations.

In the instant case, the existence of the union stewards' special duty under the contract to uphold the no-strike pledge by not participating in a strike against Petitioner was expressly recognized by Arbitrator Fisher in a previous case. Since arbitration has been recognized as part of the continuing bargaining process, Arbitrator Fisher's decision effectively became a binding and integral part of the collective bargaining agreement and continued to be the law of the contract at the time of the events presently under the Court's consideration.

The parties' bargaining history evidences their intention that the 1974 arbitrator's decision be binding in futuro. The parties negotiated two agreements subsequent to the agreement upon which the arbitration decision was based without modifying the language of the no-strike or mutual responsibility clauses. Their failure to modify the contract strongly infers that the parties incorporated the arbitrator's decision in their subsequent contract. *Carbon Fuel Co. v. United Mine Workers,* 444 U.S. 212, 222 (1979).[9]

[9] Moreover, South Central Bell's and the Union's actions in negotiating an expedited arbitration clause in their 1977 agreement confirms their intent that non-expedited arbitration decisions have precedential effect. In their 1977 agreement, the parties negotiated a provision allowing arbitration over disciplinary actions to proceed through an expedited arbitration process. Under that process, an arbitrator's decision would not constitute a precedent for other cases or grievances unless the decision was adopted by the written concurrence of the parties. (*South Central Bell, supra* at 352-53). The parties' express decision in 1977 to negate precedential effect of arbitration decisions under the new expedited process proves, by compelling negative inference, their prior agreement to give precedential effect to all arbitration decisions rendered under the ordinary grievance-arbitration pro-

We would therefore respectfully submit that the Board and the Court of Appeals for the Fifth Circuit erred by substituting is own interpretation of the collective bargaining agreement for that of the arbitrator.

**II. An Important Question Of Labor Law Exists As To Whether Fundamental Policy Considerations Require Union Stewards Be Held To A Higher Standard Of Accountability Than Rank-And-File Employees For Participating In An Unauthorized Strike.**

Apart from the contractually imposed obligations set forth above, union officials may be selectively disciplined for striking illegally because of their inherently higher responsibility to ensure that the union's no-strike commitment is honored by employees. This principle was long recognized by the Board.[10]

The importance of a union steward's role in contract administration cannot be overestimated. The steward serves an important statutory purpose by promoting the effective administration of the collective bargaining agreement. *Dairylea Cooperative, Inc.*, 219 N.L.R.B. 656, at

---

(Footnote 9 continued)
cedure. Arbitrator Fisher's decision was rendered under the ordinary grievance format. Thus, the Fifth Circuit's conclusion that the 1977 agreement concerning expedited arbitration somehow changed the intent of the parties with respect to the precedential effect of the 1974 arbitral decision is incorrect.

[10] *See i.e. Chrysler Corp.*, 232 N.L.R.B. No. 74 (1977); *University Overland Express, Inc.*, 129 N.L.R.B. 82 (1960); *Stockham Pipe Fittings Co.*, 84 N.L.R.B. 629 (1949).

658 (1975), *enforced sub nom., NLRB v. Milk Drivers & Dairy Employees,* 531 F.2d 1162 (2d Cir. 1976).[11]

Moreover, because of the stewards' position of knowledge, responsibility, and leadership in the administration of the contract, rank-and-file employees naturally look to the stewards for guidance and advice as to their rights and obligations under the collective bargaining agreement. *See NLRB v. Weingarten, Inc.,* 420 U.S. 251 (1975). They are, in the eyes of most employees, "the union". Thus, the words and actions of the union stewards are necessarily taken more seriously than the same words or acts from rank-and-file employees and their participation in a wildcat strike is viewed by employees as a signal that the strike is lawful. This principle has been recognized in prior Board decisions, yet inexplicably it was not applied in the instant case. *See e.g. Midwest Precision Castings Co.,* 244 N.L.R.B. No. 63 (1979).

The stewards' participation in the wildcat strike before this Court "provided this action with [their] active approval and encouragement...." *Chrysler Corporation,*

[11] The Board has recognized the importance of stewards in maintaining stability in the industrial sphere by approving the concept of "superseniority" for shop stewards. See e.g., *United Electrical, Radio and Machine Workers of America, Local 623 (Limpco Mfg., Inc.),* 230 N.L.R.B. No. 59, at 407 (1977); *Motion Picture Laboratory Technicians, Local 780,* 227 N.L.R.B. No. 79 at 559 (1976). Superseniority is nothing more than a blatant form of discrimination in favor of union officials which is permitted because continuity of representation and uniform contract administration are essential to maintaining stability in the collective bargaining relationship. Thus, the literal language of §8(a)(3) of the Act gives way to the overriding policy favoring industrial stability. The same rationale should apply herein.

*Dodge Truck Plant*, 232 N.L.R.B. No. 74, at 475 (1977); *see also NLRB v. Armour-Dial, Inc.*, 638 F.2d 51, 56 (8th Cir. 1981).

As front-line representatives of the union with a close rapport with the other employees, union stewards are obviously in the best position to avert an unauthorized strike. *Gould, Inc. v. NLRB*, 612 F.2d 728, 734 (3rd Cir. 1979), *cert. denied*, 449 U.S. 890 (1980). Anything that increases their incentive to meet this challenge increases the likelihood that wildcat strikes will be avoided through their efforts. Thus, singling out union stewards for extra discipline is a very effective deterrent to wildcat strikes.[12]

It is especially important to an employer to have a means of deterring wildcat strikes since his after-the-fact "remedies" are largely illusory. *See Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981) (Powell, J., concurring).

The Board's decisions on the issue of a steward's responsibility in wildcat strike situations have been marked by inconsistencies. This constant shifting by the Board has tended to obfuscate employers' rights and stewards' responsibilities.[13]

---

[12] Stewards who engage in wildcat strikes are not engaged in protected activity. Thus, the imposition of harsher discipline on union stewards is not inherently destructive of employee rights, but rather it encourages lawful union activity. *Indiana & Michigan Electric Co.*, 599 F.2d 227, 232 (7th Cir. 1979).

[13] *Compare Super Value Xenia*, 228 N.L.R.B. No. 156, at 1259 (1977) (mere participation by stewards warrants discipline); *Chrysler*

The Board's current position in this matter is not entitled to deference as its rulings have been inconsistent. *Skidmore v. Swift Co.*, 323 U.S. 134, 140 (1944). Reviewing courts need not rubber-stamp decisions of the Board that frustrate congressional policy underlying a statute. *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965).

The Circuit Courts that have considered the issue of union officers' responsibility under similar circumstances recognize the inconsistent approach taken by the Board when confronted with situations similar to that presently before this Court. *NLRB v. Armour-Dial, Inc., supra.* at 55 (8th Cir. 1981); *Gould, Inc. v. NLRB, supra.* at 732, n.4 (3d Cir. 1979); *Indiana v. Michigan Electric Co. v. NLRB*, 599 F.2d 227, 230-31 (7th Cir. 1979).

Moreover, the Circuit Courts have consistently rejected the Board's "per se" rule first announced in *Precision Castings Co.*, 233 N.L.R.B. 183 (1977) that union officials cannot be selectively disciplined for an illegal work stoppage even if the contract imposes additional respon-

---

(Footnote 13 continued)
*Corp., Dodge Truck Plant*, 232 N.L.R.B. No. 74 (1977) (steward who "exercised a leadership role" in an unlawful walkout warrants discharge); *Russell Parking Co.*, 133 N.L.R.B. 194 (1961) (Board upheld discharge of steward who merely participated in unlawful work stoppage); *University Overland Express, Inc.*, 129 N.L.R.B. 82 (1960) (status as union officials as a proper factor on which to base more severe disciplinary action); *with Precision Castings Co.*, 233 N.L.R.B. No. 35 (1977) (the Board adopted a per se rule that selective discipline can never be imposed). *See also* the Board's most recent decision *Consolidation Coal Company*, 263 N.L.R.B. No. 188 (1982) (In a 2-1-2 decision, a divided Board held union officials cannot be disciplined more harshly than rank-and-file employees).

sibility on the stewards.[14] To date, each of the courts of appeal which has addressed this "per se" rule has rejected it, although they have articulated divergent standards.[15]

It is evident that the current state of the law in this area is extremely confused and raises an important question of federal law which should be settled by the Supreme Court in order to resolve the inconsistencies among the Board and courts of appeals' decisions.

The policy of industrial stability underlying the Act compels resolution of this issue by adopting the view that even in the absence of contractual authority, union stewards may be held to a higher standard of accountability and disparate discipline will not constitute a violation of the Act.

---

[14] *See* footnote 12.

[15] *See e.g., Indiana v. Michigan Electric Co. v. NLRB*, 599 F.2d 227 (7th Cir. 1979) (the Court held extra discipline of a union official was based upon a breach of higher responsibility accompanying their status as a matter of law); *C.H. Heist Corp. v. NLRB*, 657 F.2d 178 (7th Cir. 1981) (the Court appeared to move toward the view that there must be at least some contractual basis for the imposition of more severe discipline); *Gould, Inc. v. NLRB*, 612 F.2d 728 (3d Cir. 1979) *cert. den.*, 449 U.S. 890 (1980) (the Court adopted the reasoning of *Indiana and Michigan Electric* finding the discharge of a union steward was justified under the obligations explicitly set forth in the contract); *Hammermill Paper Co. v. NLRB*, 658 F.2d 155 (3d Cir. 1981) (the Court held the increased responsibility does not arise purely by operation of law, but must have a basis in contract); *Metropolitan Edison v. NLRB*, 663 F.2d 478 (3d Cir. 1981), *cert. granted*, 102 S.Ct. 2926 (1982) (the Third Circuit narrowed its approach even more, stating it will recognize added responsibility only where there is clear contractual language); *but see NLRB v. Armour-Dial, Inc.*, 638 F.2d 51 (8th Cir. 1981) (the Court takes the broadest approach in recognizing an inherent greater responsibility on union officials).

**III. The United States Court Of Appeals For The Fifth Circuit Erred In Affirming The National Labor Relations Board's Decision On A Ground Not Relied Upon By The Board Rather Than Remanding The Case To The Board For Further Proceedings In Light Of The Rule Enunciated By The Fifth Circuit.**

In the instant case the Board, by not deferring to the arbitrator, adhered to a *per se* rule that disparate discipline can never be imposed. The United States Court of Appeals for the Fifth Circuit specifically found the *per se* rule to be incorrect. See *NLRB v. South Central Bell Telephone Co.*, 688 F.2d at 352. However, the Fifth Circuit upheld the decision of the Board on other grounds. The Court specifically decided what it perceived to be the correct standard of law to apply with respect to waiver of statutory rights and then applied the law to the facts without first allowing the Board to do so. Such action is contrary to controlling Supreme Court precedent.

In *NLRB v. Enterprise Association of Steam*, 429 U.S. 507, 522 n.9 (1977), the Supreme Court stated:

> [A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which this action can be sustained.' ... This rule has not been disturbed...When an administrative agency has made an error of law, the duty of the Court is to 'correct the error of law committed by that body, and, after doing so to remand the case to

> the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law. (Citations omitted).

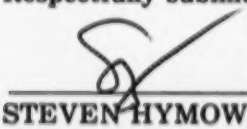
This rule was recently reaffirmed. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 101 S.Ct. 2573 at 2577, n.6 (1981).

The rationale set forth in these cases is clearly applicable to the instant set of facts. As previously stated, the Court found that the Board applied the wrong standard. Thus, the proper course of action should have been to remand the case to the Board in light of the proper standard.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue. In the alternative, if a writ does not issue, the decision on the writ should be held in abeyance pending this Court's decision in *Metropolitan Edison Co. v. NLRB*, 663 F.2d 478 (3d Cir. 1981) *cert. granted*, 102 S.Ct. 2926 (1982).

Respectfully submitted,



STEVEN HYMOWITZ*
STEFANIE J. ALLWEISS
McCALLA, THOMPSON, PYBURN & RIDLEY
1001 Howard Avenue
28th Floor
New Orleans, Louisiana 70113
504/524-2499

*Counsel of Record for Petitioner
South Central Bell Telephone Company

## CERTIFICATE OF SERVICE

I, STEVEN HYMOWITZ, hereby certify that I have on December 15, 1982, by United States Mail, postage prepaid, served (3) copies of the foregoing petition upon all parties required to be served, their names and addresses being as follows:

Fred A. Lewis
Regional Director, Fifteenth Region,
National Labor Relations Board,
Suite 2700, 1001 Howard Avenue,
New Orleans, Louisiana 70113

Elliot Moore
Deputy Associate General Counsel,
National Labor Relations Board
Office of the General Counsel
Washington, D.C. 20570

Solicitor General
Department of Justice
Washington, D.C. 20530

STEVEN HYMOWITZ